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No. 95-1796

In The
Supreme Court of the United States

October Term, 1995

THE REVEREND THOMAS L. BASICH, et. al.,
Petitioners,

v.

BOARD OF PENSIONS, EVANGELICAL LUTHERAN CHURCH IN AMERICA (ELCA), a Minnesota non-profit corporation; EVANGELICAL LUTHERAN CHURCH IN AMERICA (ELCA), a Minnesota non-profit corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The second question presented by Petitioners was neither pressed before the Minnesota Court of Appeals nor in Petitioners' petition for review to the Minnesota Supreme Court, nor was it passed upon below. Thus, it is not an appropriate subject for exercise of this Court's jurisdiction on a petition for writ of certiorari. 12 U.S.C. § 1257. Petitioners' questions do not disclose that the decision below was based, in part, on independent and adequate state grounds not reviewable by this Court by writ of certiorari. (*See infra* at 14-15). The two questions which would be before this Court if certiorari were granted are:

1. Whether the Freedom of Conscience Clause of the Minnesota Constitution precludes Minnesota courts from exercising jurisdiction over a claim alleging that the Evangelical Lutheran Church in America ("ELCA") and the Board of Pensions of the ELCA ("Board of Pensions") breached contractual and fiduciary obligations to "church pension plan" participants when the Board of Pensions adopted a policy to guide investments based on established religious doctrine and church policy.

2. Whether the First Amendment to the federal Constitution precludes Minnesota courts from exercising jurisdiction over a claim alleging that the ELCA and the Board of Pensions breached contractual and fiduciary obligations to "church pension plan" participants when the Board of Pensions adopted a policy to guide investments based on established religious doctrine and church policy.

RULE 29.6 STATEMENT

The Board of Pensions is a Minnesota non-profit religious corporation which issues no stock. It is a Churchwide Unit of the ELCA, a separately incorporated Minnesota non-profit religious corporation, which issues no stock.

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STATEMENT OF JURISDICTION

Contrary to Petitioners' statement of jurisdiction, 28 U.S.C. § 1257 does not confer certiorari jurisdiction upon this Court because the second question presented by Petitioners was neither pressed nor passed upon below and thus does not constitute a final judgment or decree rendered by the highest court of a State. In addition, the Minnesota Court of Appeals' decision rests on independent and adequate state grounds not reviewable by this Court. (*See infra* at 14-15).

CONSTITUTIONAL PROVISIONS INVOLVED

The Freedom of Conscience Clause, Section 16, Article I of the Constitution of the State of Minnesota provides:

> The enumeration of rights in this constitution shall not be construed to deny or impair others retained by and inherent in the people. The right of every man to worship God according to the dictates of his own conscience shall never be infringed, nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State, nor shall any money be drawn from the treasury for the benefit of any religious societies, or religious or theological seminaries.

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

The action below arises out of a disagreement between the Petitioners and their church over which religious doctrines and church policies could properly provide a foundation for the guidance of pension fund investments. The Petitioners take the position that while "the ELCA could properly prohibit investments in morally obnoxious commercial activity such as prostitution and pornography," (App. at A-8),[1] the Board of Pensions could **not** properly adopt a policy designed to combat what the ELCA termed the "sin" of apartheid. The Minnesota Court of Appeals held that the Freedom of Conscience Clause of the Minnesota Constitution, and the First Amendment to the United States Constitution, barred the Minnesota courts from exercising jurisdiction over Petitioners' claims because the policy at issue was based on established religious doctrine and church policy. (App. at A-1-11).

[1] Citations to Appendix of Respondent Board of Pensions are designated "(App. at ___)." Although the decision of the Minnesota Court of Appeals is set forth in the Petitioners' Appendix, it is also reproduced in the Board of Pensions' Appendix for the convenience of the Court.

In 1987, at the Constituting Convention of the ELCA, The American Lutheran Church ("ALC"), the Lutheran Church in America ("LCA"), and the Association of Evangelical Lutheran Churches ("AELC"), agreed to merge and form the ELCA. *See* Evangelical Lutheran Church in America Constitutions, Bylaws, and Continuing Resolutions ("ELCA Constitution"), Preamble (App. at B-3).

> The basic commitments of the . . . [ELCA] as well as its organizational outline, structural patterns, and rubrics of governance are reflected by this church's constitutions, bylaws, and continuing resolutions.

Id., Introduction (App. at B-2). The ELCA Constitution was adopted by the Constituting Convention. *Id.*, Preamble (App. at B-3).

The ELCA Constitution contains the following provision:

> This church shall seek to function as people of God through congregations, synods, and the churchwide organization, all of which shall be interdependent. Each part, while fully the church, recognizes that it is not the whole church and therefore lives in a partnership relationship with the others.

Id., § 8.11 (App. at B-4-5).

The ELCA is composed of 65 Synods governing over 11,000 congregations. (App. at BOP-714).[2] The voting members of 65 Synod Assemblies, on a representative basis, elect the members of the Churchwide Assembly. The Churchwide Assembly is the highest legislative authority in the

[2] Citations to the Board of Pensions' Appendix filed with the Minnesota Court of Appeals are designated "(App. at BOP-___)."

ELCA and it meets every two years. *Id.*, §§ 12.11, 12.31, 12.41.11 (App. at B-5) (App. at BOP-370, 371). The Churchwide Assembly elects the Bishop of the ELCA, who also serves as President and Chief Executive Officer of the ELCA, the Vice President and Secretary of the ELCA, and the 33 members of the Church Council. *Id.*, §§ 13.21, 13.22a, 13.32, 13.42 & 14.31 (App. at BOP-374-76, 380). The Church Council is the interim legislative authority for the ELCA between meetings of the Churchwide Assembly. *Id.*, § 4.11 (App. at B-5).

The Board of Pensions of the ELCA ("Board of Pensions") was also created in 1987 at the Constituting Convention. The Board of Pensions is a separately incorporated Churchwide Unit established to provide church pension and other benefits plans for the benefit of eligible workers employed within the structure of the ELCA. Participation in the various plans is limited to qualifying employers, including congregations, and participation is entirely voluntary. *Id.*, §§ 17.12, 17.61 & 17.61.A91.d (App. at B-6, 8). As a part of the ELCA churchwide organization, the Board of Pensions is established to "carry out God's mission through this church." *Id.*, § 4.03(a) (App. at B-4).

The Churchwide Assembly elects the 21 members of the Board of Trustees of the Board of Pensions. *Id.*, § 17.61.03 (App. at BOP-421). The Churchwide Assembly is also responsible for creating the governance structure for the Board of Pensions and approves the documents establishing and governing the Board and its program. *Id.*, § 17.61.01 (App. at B-7).

The ELCA Constitution recognizes that the Board of Pensions is not only part of the church in a partnership relationship with the other parts of the churchwide organization, the synods and the congregations, but also recognizes that it has the responsibility to use its best judgment in the investment of the assets of the pension plan and to comply with its fiduciary responsibilities. *Id.*, § 8.11

(App. at B-4-5). The specific responsibilities of the Board of Pensions are set out in the Continuing Resolutions of the ELCA Constitution. *Id.*, § 17.61.07 (App. at B-7).

Continuing Resolutions 17.61.A91.a and 17.61.A91.b of the ELCA Constitution provide as follows:

> a. This board shall manage and operate the pension and other benefits plans for this church with the design and policy adopted by the Churchwide Assembly and shall invest the assets according to its best judgment.
>
> b. The Investment Committee of the Board of Pensions shall receive advice and counsel from the Advisory Committee on the Church's Corporate Social Responsibility formed by the Division for Church in Society and within the context of fiduciary responsibility make appropriate recommendations to the board.

(App. at B-7-8). Thus, under its constituting authority, the Board of Pensions has a dual responsibility, to make investment decisions within the context of its best judgment and its fiduciary responsibilities as well as to make such decisions within the design and policy adopted by the Churchwide Assembly.

All of the pension investments managed by the Board are managed under the pertinent provisions of the ELCA Constitution (App. at BOP-300-502), the Board's Articles of Incorporation and Bylaws, (App. at BOP-32-33, 43-44) the Regular Pension Trust (App. at BOP-503-41) and Regular Pension Plan (App. at BOP-542-604).[3] Consistent with the

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[3] Contrary to petitioners statements (Petition at 7), the Board of Pensions holds the assets of the pension plan in trust for the benefit of the pension plan participants. The Board of Pensions has a trust rela-

ELCA Constitution, the Board's Articles of Incorporation and Bylaws provide that:

> This corporation is organized and shall be operated exclusively for religious purposes and exclusively for the benefit of and to assist in carrying out the purposes of the Evangelical Lutheran Church in America (the "ELCA"), a Minnesota non-profit corporation. In furtherance of these purposes this corporation shall manage and operate the worker benefits plans for the ELCA and its institutions within the design and policy adopted from time to time by the Churchwide Assembly or Church Council of the ELCA.

(App. at C-2). Likewise, the Regular Pension Trust is formed

> exclusively for religious and charitable purposes and in connection therewith exclusively for the benefit of, and to assist in carrying out the purposes of, the Evangelical Lutheran Church in America.

(App. at D-2).

This dispute represents the culmination of a theological debate within the Lutheran community, dating back to the early 1970s, regarding how to express the Lutheran churches' opposition to apartheid. (App. at BOP-944-60, 971-80). In 1977, the Lutheran World Federation, the community of the worldwide Lutheran family, met in assembly in Dar es Salaam, Tanzania, and declared that apartheid was

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tionship with the pension plan participants, not a contractual relationship.

> so oppressive and so contrary to the Lutheran understanding of the unity of believers in Christ and the equality of the entire human family that it must be rejected as a matter of the faith itself.

(App. at E-2).

The delegates to the 1977 Lutheran World Federation Assembly declared opposition to apartheid to be a matter of "*status confessionis*," that is, a fundamental confession of the faith of the Lutheran church. (App. at E-2).

> [A]partheid is viewed by us as simply and starkly in conflict with the biblical faith we hold. It is not a political ideology with which believers may compromise, but must be opposed by whatever means are at hand.

(App. at E-3).

At the 1987 Constituting Convention of the ELCA, the delegates passed Resolution 87.2.50, which provided:

> **Resolved, that we, the delegates of the Constituting Convention of the ELCA, express our unqualified opposition to the apartheid system in South Africa, and the illegal occupation and oppression by South Africa of Namibia; and be it further**
>
> **Resolved, that we pledge to you that we will work tirelessly to see that none of our ELCA Pension Funds will be invested in companies doing business in South Africa** . . . .

(App. at F-3) (emphasis in original). Resolution 87.2.50 was the directive the Board of Pensions of the ELCA received from the Constituting Convention at its inception.

At its June 1988 meeting, the Board of Pensions responded to Resolution 87.2.50 by adopting the following policy:

> ELCA Board of Pensions Policy Statement
>
> As part of the Evangelical Lutheran Church in America, the Board of Pensions continues to be sympathetic to the plight of the oppressed people of South Africa/Namibia. . . . The Board of Pensions has declared its desire fully to reflect the action of the Constituting Convention with respect to divestment for all investments to the extent permitted by the Board's fiduciary responsibilities.
>
> . . .
>
> First, the Board of Pensions has directed that, whenever the conditions of risk and return are equal in the choice among stocks and bonds held by the Board on behalf of Plan members, or available for purchase, the holdings in companies with South Africa investments will be divested, and similarly, investments in these companies will not be made.

(App. at G-1-2). The language of the Board's 1988 Policy Statement concerning investment decisions as subsequently amended, is referred to as the "Equivalency Policy."[4]

The Board's 1988 Policy Statement was sent to the Church Council for consideration. In its July 1988 meeting, the Church Council responded by affirming:

[4] Contrary to petitioners claim (Petition at 8), there is no basis for concluding that the application of the Equivalency Policy resulted in any underperformance losses to the pension plan.

> that the Board of Pensions will fully reflect the action of the Constituting Convention that "none of our ELCA Pension Funds . . . be invested in companies doing business with South Africa," within the context of its fiduciary responsibility.

(App. at H-1).

At the 1989 Churchwide Assembly, 44 of the 65 Synods sent memorials to the Churchwide Assembly requesting deliberate and complete divestment of pension fund assets from companies doing business in South Africa (App. at BOP-716, 792).[5] The memorials resulted in an emotionally charged 70 minute floor debate within the highest legislative body of the ELCA that was seen as the climax of the years of struggle over this issue. (App. at BOP-792). The Churchwide Assembly, as the highest legislative authority of the ELCA, determined that the ELCA pension funds were to be completely divested by September 1, 1991.[6] (App. at BOP-739).

[5] Memorials from a Synod Assembly to the Churchwide Assembly are the means by which a Synod Assembly proposes actions to be considered by the Churchwide Assembly. ELCA Constitution § 10.21.c.8 (App. at BOP-361).

[6] The action of the 1989 Churchwide Assembly did not go uncriticized within the Lutheran community. One group that opposed divestment of ELCA pension funds was "Lutherans for Religious and Political Freedom," which publishes a newsletter, "The Lutheran Commentator." A special edition of the Lutheran Commentator on divestment was published following the 1989 Churchwide Assembly. (App. at BOP-795-802). Three of the Plaintiffs, the Reverend Thomas L. Basich, Robert D. Hansen, and David M. Carlson wrote articles or letters which were included in the special edition. All of the articles were critical of the action taken by the 1989 Churchwide Assembly. (App. at BOP-795-802).

After review of the Churchwide Assembly's action, the Board of Pensions stated that immediate and complete divestment would create an exception to the prudent person and exclusive benefit rules as stated in the plan documents and recommended that it not be implemented. (App. at BOP-717). After additional debate and review, the ELCA Church Council determined that the Board of Pensions was to establish investment options that were South Africa Free, continue to apply the Equivalency Policy to the unscreened pension funds and continue to communicate its actions on divestment to the Church Council semi-annually. (App. at BOP-718).

The Equivalency Policy was adopted by the Board of Pensions in response to the actions of the Constituting Convention, the Churchwide Assembly and the Church Council. (App. at BOP-716). It reflects the Board's balancing of its dual responsibility to the Church and its religious purposes and to the Plan members and its fiduciary obligations.

On September 27, 1993, thirty of the Plaintiffs (who were subsequently joined by an additional 19 Plaintiffs), commenced a lawsuit against the ELCA Board of Pensions and the ELCA seeking individual relief on the grounds of breach of contract, declaratory relief and injunctive relief. The district court granted the ELCA and Board's motions to dismiss the second and third counts of the suit for declaratory and injunctive relief,[7] but denied their motions for summary judgment on the contract claim as the court found there were material facts at issue concerning the parties' relationship. On March 6, 1995, the ELCA and the Board of Pensions again

[7] The trial court ruled these claims were moot as the Equivalency Policy was no longer in effect (App. at BOP-15-20). The Board of Pensions eliminated the policy as of November 12, 1993, given the changes then occurring in South Africa. (App. at BOP-917-22, 923).

moved for summary judgment on the grounds that the First Amendment of the United States Constitution and the Freedom of Conscience Clause of the Minnesota Constitution deprived the court of subject matter jurisdiction. The district court denied the motion. The defendants appealed to the Minnesota Court of Appeals which reversed the district court. The Minnesota Supreme Court denied Petitioners' Petition for Review.

SUMMARY OF THE ARGUMENT

Petitioners' Writ of Certiorari should be denied for the following reasons:

First, the second question presented by Petitioners—whether the Minnesota Court of Appeals' application of the Freedom of Conscience Clause of the Minnesota Constitution violates the United States Constitution—was neither pressed nor passed on below. It thus does not constitute a decision by a state court of last resort that is appropriate for review by this Court.[8] S. Ct. R. 10; 28 U.S.C. § 1257(a) (*See infra* at 13-14).

Second, the Minnesota Court of Appeals' judgment rests on adequate and independent state grounds. Respect for the independence of state courts and the avoidance of rendering advisory opinions have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground for the decision. (*See infra* at 14-15).

[8] Petitioners' second question is raised at this untimely stage of the proceedings merely as a strategic device to mask the existence of adequate and independent state grounds for the decision of the Minnesota Court of Appeals, and presents no serious constitutional questions. (*See infra* at 14-15).

Third, the Minnesota Court of Appeals properly held that the Freedom of Conscience Clause of the Minnesota Constitution precludes a civil trial court from exercising jurisdiction over Petitioners' claim that the ELCA and its Board of Pensions breached contractual and fiduciary obligations to the ELCA's "church pension plan" participants by adopting a policy to guide investments based upon church doctrine and resolutions adopted by the ELCA's Constituting Convention and the Churchwide Assembly, the ELCA's highest legislative body. (*See infra* at 18-20).

Fourth, contrary to Petitioners' arguments, the Minnesota Court of Appeals did not make erroneous factual findings or misapply the Establishment Clause, but properly held that the First Amendment of the United States Constitution precludes a civil trial court from exercising jurisdiction over Petitioners' claim that the ELCA and its Board of Pensions breached contractual and fiduciary obligations to the ELCA's "church pension plan" participants by adopting a policy to guide investments based upon church doctrine and resolutions adopted by the ELCA's Constituting Convention and the Churchwide Assembly, the ELCA's highest legislative body. (*See infra* at 21-24).

Thus, Petitioners present no appropriate or compelling reasons for granting certiorari. The Minnesota Court of Appeals did not decide an important federal question that conflicts with the decision of another state court of last resort or of a United States Court of Appeals, nor did it decide an important issue of federal law that has not been, but should be, settled by this Court, or that conflicts with relevant decisions of this Court.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

Petitioners' Second Question Was Neither Pressed Nor Passed On Below, Thus Providing No Jurisdictional Basis for Granting the Petition for Writ of Certiorari

Petitioners acknowledge that the question of whether the application of the Minnesota Constitution's Freedom of Conscience Clause violates the federal Constitution was neither pressed nor passed upon below. (Petition at 9). Thus, a grant of certiorari with respect to this question would be inappropriate.

Whether construed to be a principle of jurisdiction or prudence (Petition at 10), the rule against considering questions neither pressed nor passed on below is fundamental. The rule is founded on "reasons of peculiar force" based on "due regard for the appropriate relationship of this Court to state courts." *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940). The rule pervades this Court's statutory jurisdiction,[9] requirements governing the contents of a petition for writ of certiorari,[10] and considera-

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[9] 28 U.S.C. § 1257(a) provides in part: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . ."

[10] The requirements for a petition for writ of certiorari include a statement of the case setting out "the stage of the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised" and "the method or manner of raising them and the way in which they were passed on by those courts." S. Ct. R. 14(1)(g)(i).

tions governing review on certiorari.[11] "[T]his Court . . . consistently refuses to consider any grounds of attack not raised or decided in [state] court." *Id.* at 434-35.

The Petitioners offer no justification for presenting a novel question at this stage of the proceedings. The question posed does not concern a core issue such as the "vitality of civil and political institutions in our society." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). The question cannot be characterized as "plain error" on the record. *Vachon v. New Hampshire*, 414 U.S. 478, 479 & n.1 (1974). Simply put, the Petition for Writ of Certiorari pending before this Court offers no compelling reason why it should be one of a mere handful of exceptions made to the rule over the past 170 years. *See Illinois v. Gates*, 462 U.S. 213, 219 (1983).

The Decision Below Rests On Independent And Adequate State Grounds And Thus Is Inappropriate for Review

As this Court has stated:

> Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground.

Michigan v. Long, 463 U.S. 1032, 1040 (1983).

Indicia of the independence and adequacy of the decision below are clear on the face of the Court of Appeals' decision.

[11] Considerations governing review of cases coming from state court all assume that the state court has "decided" a federal question. S. Ct. R. 10.

The Court of Appeals cites, quotes and relies on the Freedom of Conscience Clause of the Minnesota Constitution. (App. at A-9); *see id.* The Court of Appeals distinguishes the effect of the Freedom of Conscience Clause from the federal constitution, noting that the state constitution "affords greater protection for religious liberties." (App. at A-9); *see id.* at 1040-41. The Court of Appeals recites the four factors to be considered to determine whether government action violates the Freedom of Conscience Clause. These factors, though similar to those in the test under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), are not identical. (App. at A-9); *see Long*, 463 U.S. at 1041. The Court of Appeals separately examines each of three factors, relying on Minnesota law, and concludes that government action in this instance would violate the Freedom of Conscience Clause, rendering examination of the fourth factor, least intrusive means, unnecessary. (App. at A-11); *see id.*

> If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

Id.

Because the decision below rests on independent and adequate state grounds, it is not properly reviewable by this Court.

Petitioners' Second Question Presents No Substantial Federal Issues

Petitioners' arguments in support of their second question reflect assumptions, or implicate conclusions, that are inimical to fundamental principles of constitutional law. They are unsupported and unsupportable.

Petitioners argue that the application of Minnesota's Freedom of Conscience Clause to the circumstances of this case constitutes a "denial of Petitioners' right of access to the courts" in violation of their federal right to due process. (Petition at 15). Due Process, however, does not guarantee specific results in court. *Barrows v. Jackson*, 346 U.S. 249, 260 (1953). It guarantees only that litigants will be afforded a meaningful opportunity to be "heard" upon claimed rights. Petitioners were afforded an opportunity to be heard by both the district court and the Minnesota Court of Appeals. They were thus afforded all the process due them.

Petitioners further argue that "[n]o compelling interest" supports the purported denial of Petitioners' right of access to the courts to pursue their claims. (Petition at 15). In an almost offhanded manner, Petitioners dismiss Minnesota's interest in enforcing its own constitutional protection of freedom of religion—which the Minnesota Supreme Court has described as "precious" (*see infra* at 18)—arguing that the Freedom of Conscience Clause must yield to virtually any assertion of any purported civil right. Petitioners' Due Process arguments ignore the fundamental proposition that a State may extend greater protection to its citizens than that afforded under the United States Constitution, *Arizona v. Evans*, 514 U.S. ___, 131 L. Ed. 2d 34, 42 (1995), and that Minnesota has expressly done so under its Freedom of Conscience Clause. (*See infra* at 18-20).

Petitioners argue that application of the Freedom of Conscience Clause denies their contractual rights and is an unconstitutional impairment of contract. (Petition at 15). Petitioners' position ignores the fact that any rights Petitioners may have acquired were subject to the provisions of the Minnesota Constitution. *See Wood v. Lovett*, 313 U.S. 362, 370 (1941); *General Motors Corp. v. Romein*, 503 U.S. 181, 189 (1992) (the binding force of an obligation of contract depends on the laws in existence when the contract was made, forming a part of such contract). The application of the Freedom of Conscience Clause cannot constitute a retroactive impairment of Petitioners' claimed contract rights.

Petitioners also argue that application of the Freedom of Conscience Clause violates their right to free speech. (Petition at 18-19). Petitioners rely solely on *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), for this argument. But Petitioners' argument is inapposite for the simple reason that the Board of Pensions did not contribute any of Petitioners' funds to any social or political cause as was done in *Abood*. *Abood's* holding, that public workers could not be compelled to contribute to political candidates, and that the First Amendment prohibited the union from contributing required membership dues to political candidates, simply does not apply here. *Abood* is further distinguishable because the conduct about which Petitioners complain is part of the fundamental mission of the ELCA and the Board of Pensions, rather than being an action unrelated to the Board's official purpose. *Cf. id.* at 235 (First Amendment barred union from using mandatory dues for the expression of political views unrelated to its duties as bargaining representative for the workers).

Finally, Petitioners argue that the application of the Freedom of Conscience Clause creates "two classes of pension plan participants" in violation of the Equal Protection Clause, those who participate in religious plans, and those who participate in non-religious plans. (Petition at 17-18). On its face, however, the Freedom of Conscience Clause creates no classification except to the extent that every statute, by virtue of the fact that it has an impact on persons falling within its purview and not others, can be said to create a classification. The Freedom of Conscience Clause applies even-handedly to all persons. Because it "neither burdens a fundamental right nor targets a suspect class," it must be upheld under the Fourteenth Amendment as bearing a "rational relation" to a legitimate end; the State's concern with the preservation of religious liberty. *See Romer v. Evans*, ___ U.S. ___, 64 U.S.L.W. 4353, 4356 (1996).

Asserting Civil Jurisdiction Over Petitioners' Claims Would Violate the Freedom of Conscience Clause of the Minnesota Constitution

The Minnesota Court of Appeals correctly held that the Freedom of Conscience Clause of the Minnesota Constitution deprived Minnesota courts of subject matter jurisdiction over this action. (App. at A-11).

As observed by the Minnesota Supreme Court, "[r]eligious liberty is a precious right." *State v. Hershberger*, 462 N.W.2d 393, 398 (Minn. 1990). The *Hershberger* court stressed that the preamble to the Minnesota constitution gives religious liberty coequal status with civil liberty:

> "We, the people of the state of Minnesota, grateful to God for our civil *and religious liberty*, and desiring to perpetuate its blessings and secure the same to ourselves and our posterity, do ordain and establish this Constitution."

Id. at 398 (quoting Minn. Const. preamble) (emphasis in original). The Freedom of Conscience Clause, Article 1, Section 16 of the Minnesota Constitution, bars "any control of or interference with the rights of conscience." Minnesota's Freedom of Conscience Clause provides a "distinctively stronger character of protection" to religious liberties than the First Amendment of the Federal Constitution.[12] *Id.* at 397. In short:

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[12] In *State v. Hershberger*, 444 N.W.2d 282 (Minn. 1989) ("*Hershberger I*"), *vacated*, 495 U.S. 901 (1990), the Minnesota Supreme Court held that the First Amendment to the United States Constitution barred the State of Minnesota from requiring members of the Amish community to display traffic warning signs on their vehicles. This Court granted certiorari, vacated *Hershberger I*, and remanded the case for reconsideration in light of *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990). On remand, the Minnesota Supreme Court reached the same conclusion, this time based on the Freedom of Conscience Clause of the Minnesota Constitution. *Hershberger*, 462 N.W.2d at 399.

> Minnesotans are afforded greater protection for religious liberties against governmental action under the state constitution than under the first amendment of the federal constitution.

Id.

Minnesota recognizes that "[i]t is not the province of the court to examine the reason of religious beliefs or to resolve purely religious disputes." *Hill-Murray Federation of Teachers v. Hill-Murray High School*, 487 N.W.2d 857, 865 (Minn. 1992). Contrary to Petitioners' protests, the central issue in this controversy is not *whether* Respondents may properly adopt moral criteria to guide investments, but *what* criteria are adopted. As the Court of Appeals observed, Petitioners take the position that the ELCA could properly prohibit investments by the Board of Pensions "in morally obnoxious commercial activity such as prostitution or pornography." (App. at A-8). Thus, Petitioners do not reject the concept of considering social or moral guidelines for investments, but merely object to investment guidelines which do not meet their personal approval. By their claims, Petitioners ask the courts to invade what is not their province, "to examine the reason of religious belief" and "to resolve purely religious disputes" internal to the ELCA.

To determine whether a challenged government action violates the Freedom of Conscience Clause, Minnesota courts consider (1) whether the objector's belief is sincerely held; (2) whether the action burdens the exercise of religious beliefs; (3) whether the state's interest is compelling; and (4) whether

the state action uses the least restrictive means. *Id.* at 865 The Minnesota Court of Appeals considered these factors and concluded that state action could not be sustained. (App. at A-10-11).

The Minnesota Court of Appeals held that there is "no question that the ELCA acted pursuant to a sincerely held religious belief by enacting the equivalency policy." (App. at A-10). The Minnesota Court of Appeals further held that civil adjudication of Petitioners' claims "would burden the exercise of the ELCA's religious beliefs":

> If the civil courts were allowed to rescind pension plan contracts every time a group of dissenting participants disagreed with the Board of Pensions' social or moral investment strategies, the ELCA's ability to express its faith through social and moral investment would be substantially compromised.

(App. at A-10). Finally, the Court of Appeals held that the government does not have a compelling interest in reviewing this case. (App. at A-11) Expressly rejecting one of Petitioners' central contentions, the Court of Appeals held that the ELCA's internal processes were the appropriate forum to resolve Petitioners' objections to Church policy. (App. at A-11).

Unwilling to accept their Church's judgment, the Petitioners turned to the civil courts. But as the Court of Appeals held: "Judicial inquiry into issues of church doctrine is itself a substantial burden" (App. at A-10), and barred under the Freedom of Conscience Clause.

Asserting Civil Jurisdiction Over Petitioners' Claims Would Violate the First Amendment to the United States Constitution

The Minnesota Court of Appeals correctly held that

> the Establishment Clause of the First Amendment deprives the district court of subject matter jurisdiction in this dispute because review of this issue would require the district court to look beyond neutral principles of contract and trust law and entangle itself in issues of church doctrine.

(App. at A-8).

Petitioners attempt to create the impression that the Minnesota Court of Appeals "misapplied" the Establishment Clause to a civil dispute by describing the issues and holding below in terms carefully cleansed of religious content. Petitioners' approach permits them to assert misleadingly that the holding of this case "affects every person who enters into a contract with a religious organization." (Petition at 14). In fact, the holding of this case is that the First Amendment of the United States Constitution protects judgments about doctrine and governance made by a religious organization, and is squarely in the mainstream of this Court's decisions regarding the extent to which civil courts may intrude on religious matters.

As the Court of Appeals noted, "the parties do not allege that Minnesota contract and trust law lacks a secular purpose or that its primary effect inhibits or advances religion." (App. at A-6). Thus, the Court of Appeals focused on

> whether review of this dispute would cause excessive entanglement between church and state and whether, under *Jones* [*v. Wolf*, 443 U.S. 595

(1979)], this dispute can be resolved by neutral principles of law.

(App. at A-6). An examination of the Court of Appeals' decision discloses the deeply religious nature of the underlying disputes and the inability to resolve the disputes based on neutral principles of law.

- Petitioners argue that the Court of Appeals "misapplied"[13] *Serbian Eastern Orthodox Diocese of U.S. & Canada v. Milivojevich*, 426 U.S. 696 (1976), on the grounds that "this case does not involve core issues of ecclesiastical concern," nor addresses matters of internal discipline or the government or direction of a religious organization. (Petition at 12-13).

In fact, as the Court of Appeals held, the ELCA created the Board of Pensions "**both** to provide for pastors' retirement needs **and** assist the ELCA in accomplishing doctrinal goals." (App. at A-8) (emphasis in original). The Lutheran World Federation "declared that apartheid must be rejected as a matter of the Lutheran faith itself." (App. at A-10). The Constituting Convention of the ELCA passed a resolution stating that "divestment was the appropriate response to the 'sin of apartheid.'" (App. at A-10). The Churchwide Assembly, the highest legislative authority of the ELCA, voted to divest funds from companies with holdings in South Africa, and directed the Board of Pensions to implement a divestment policy. (App. at A-4).

[13] A petition for writ of certiorari "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. R. 10.

- Petitioners argue that the Court of Appeals "misapplied" *Jones v. Wolf*, 443 U.S. 595 (1979), on the grounds that "the District Court would not have to review church doctrine or the ELCA's motives to determine whether the ELCA breached their contractual and fiduciary duties." (Petition at 11-12).

In fact, as the Court of Appeals held, the plan document, which governs the relationship between Petitioners and the Board of Pensions, requires the Board of Pensions to discharge its duties "with the care that a prudent person would use in the conduct of an enterprise **of like character with like aims**" (App. at A-8) (emphasis added), thereby requiring a court to examine the Board of Pensions' aims and motives (App. at A-8). The Board of Pensions' aims and motives are defined, in part, by its Articles of Incorporation, which provide that the Board is "organized and shall be operated exclusively for religious purposes and exclusively for the benefit of and to assist in carrying out the purposes of the ELCA." (App. at A-4).

- Petitioners argue that the Court of Appeals "misapplied" *Lemon v. Kurtzman*, 403 U.S. 602 (1971), on the grounds that civil review of the adoption of the equivalency policy "would in no way require" the "comprehensive, discriminating and continuing state surveillance" proscribed under *Lemon*. (Petition at 13-14).

In fact, as the Court of Appeals held, the implication of Petitioners' claims is that a civil court would be permitted to rescind pension plan participation "every time a group of dissenting participants disagreed with the Board of Pensions' social or moral investment strategies." (App. at A-10). Civil courts would become the final arbiter of internal church decisions as to how to manage pension assets in a manner consistent with the doctrine and decisions of the church's legislative

authorities—"comprehensive, discriminating and continuing state surveillance."

The Court of Appeals decision is well within the historical mainstream of this Court's jurisprudence which, though much of it predates *Lemon*, informs analysis of the scope of prohibited entanglement between state and church. *E.g.*, *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Milivojevich*, 426 U.S. 696.

CONCLUSION

For all the reasons stated above, this Court should deny the petition for a writ of certiorari.

Dated this 5th day of June, 1996

Respectfully submitted,

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STATE OF MINNESOTA

IN COURT OF APPEALS

C8-95-882
CX-95-883

Hennepin County
District Court File
No. 9316711

Kalitowski, Judge

The Reverend Thomas L. Basich, et al.,

Respondents,

Robert C. Bell
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Roseville, MN 55113

Lynn E. Basich
3000 North Hamline Avenue
Roseville, MN 55113

vs.

Board of Pensions,
Evangelical Lutheran Church
in America (ELCA),

Appellant (C8-95-882),
Defendant (CX-95-883),

John D. French
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Thomas H. Bennin
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Filed November 28, 1995
Office of Appellate Courts

SYLLABUS

The Establishment Clause of the First Amendment and the Freedom of Conscience Clause of the Minnesota Constitution deprive the district court of subject matter jurisdiction over a breach of contract action where respondent pastors allege that the Evangelical Lutheran Church of America wrongfully directed the church's board of pensions to invest pursuant to social and moral concerns rather than solely in the pastors' best financial interest.

Reversed.

Considered and decided by Kalitowski, Presiding Judge, Huspeni, Judge, and Davies, Judge.

OPINION

KALITOWSKI, Judge

Respondents, several Lutheran pastors, a lay employee and a Lutheran congregation (Pastors), filed this individual action for breach of contract and breach of fiduciary duty against appellants, the Evangelical Lutheran Church of America (ELCA) and the Board of Pensions of the Evangelical Lutheran Church of America (Board of Pensions). The ELCA and the Board of Pensions moved for summary judgment on the grounds that the First Amendment of the United States Constitution and the Freedom of Conscience Clause of the Minnesota Constitution deprive the court of subject matter jurisdiction in this dispute. The district court denied the motion.

FACTS

The Pastors participate in defined contribution pension accounts, contributed to by their congregations and administered by the Board of Pensions. The Pastors allege that the Board of Pensions has mismanaged funds by investing and divesting pursuant to social concerns rather than solely in the economic best interests of the plan participants.

The ELCA and the Board of Pensions are organized as Minnesota nonprofit corporations. The ELCA is comprised of 65 Synods governing 11,000 congregations. Each Synod elects representatives to the Churchwide Assembly, the highest legislative authority in the ELCA. When the Churchwide Assembly is not in session, the ELCA is governed by the Church Council. The Board of Pensions was established by the ELCA in 1988 to provide retirement income and benefits

to Lutheran pastors and lay church employees. The ELCA Constitution provides that the Board of Pensions is to manage and operate the pension fund with the "design and policy adopted by the Churchwide Assembly." The Board of Pension's Articles of Incorporation provide that the Board is

> organized and shall be operated exclusively for religious purposes and exclusively for the benefit of and to assist in carrying out the purposes of the ELCA.

The ELCA Churchwide Assembly and Council have final authority and control over policies implemented by the Board of Pensions.

In 1977 the Lutheran World Federation Assembly declared that apartheid was so contrary to the Lutheran understanding of believers in Christ that it must be rejected as a matter of faith itself. The ELCA expressed its opposition to apartheid by passing a resolution to "see that none of our ELCA pension funds will be invested in companies doing business in South Africa." The Board of Pensions responded in 1988 by adopting the "equivalency policy," whereby the Board of Pensions agreed to divest (and refrain from making new investments) in companies with South African holdings whenever the conditions of risk and return were equal between stocks and bonds held by the Board. The equivalency policy governed investment decisions until its repeal in 1993.

A dissenting group of Lutherans led by respondent Reverend Thomas Basich disagreed with the Churchwide Assembly's divestment policy. Basich and others published articles opposing the ELCA's decision to use its assets as a political weapon and condemning the Board of Pensions for "acquiescing" to the Churchwide Assembly's pressure on the issue of apartheid. Basich requested that he and others be allowed to withdraw their pension funds. The Board of Pensions denied this request. In response, Basich and others filed a derivative action suit against the Board of Pensions. This

court held the Pastors did not have standing to bring a derivative suit. Basich v. Board of Pensions of Evangelical Lutheran Church in Am., 493 N.W.2d 293, 296 (Minn. App. 1992). The Pastors then filed this action for individual relief on the grounds of breach of contract and breach of fiduciary duty.

ISSUES

1. Does the First Amendment of the United States Constitution prevent the district court from exercising jurisdiction over this dispute?

2. Does the Freedom of Conscience Clause of the Minnesota Constitution prevent the district court from exercising jurisdiction over this dispute?

ANALYSIS

A motion for summary judgment shall be granted when there is no issue of material fact and a party is entitled to judgment as a matter of law. Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993). None of the facts relevant to a determination of this summary judgment motion are disputed. The only remaining issue, therefore, is whether the federal or state constitution deprives the court of subject matter jurisdiction of the Pastors' claim. This issue is a question of law. A reviewing court is not bound by and need not give deference to a trial court's decision on a purely legal issue. Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n, 358 N.W.2d 639, 642 (Minn. 1984).

I.

The ELCA and the Board of Pensions allege that the First Amendment to the United States Constitution deprives

the district court of subject matter jurisdiction. The First Amendment provides that

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

U.S. Const. amend I. The Establishment Clause cannot easily be reduced to a single test. Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510, 2528 (1995). The Supreme Court has held that for an exercise of governmental authority to be valid under the Establishment Clause, it must: (1) have a secular purpose; (2) neither inhibit nor advance religion as its primary effect; and (3) not create excessive entanglement between church and state. Lemon v. Kutzman, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 2111 (1971). The Supreme Court has also applied the "principles of neutrality" test, requiring that civil courts hear only disputes which can be determined on the basis of neutral principles of law. Jones v. Wolf, 443 U.S. 595, 602, 99 S. Ct. 3020, 3025 (1979).

Applying the Lemon factors, the parties do not allege that Minnesota contract and trust law lacks a secular purpose or that its primary effect inhibits or advances religion. Therefore, we need only consider whether review of this dispute would cause excessive entanglement between church and state and whether, under Jones, this dispute can be resolved by neutral principles of law.

Whether government action causes excessive entanglement depends on the nature of the intrusion into religious administration, the character and purpose of the involved institutions and the resulting relationship between the religious authority and government. Lemon, 403 U.S. at 614 -15, 91 S. Ct. at 2112. If a claim involves core issues of ecclesiastical concern, the potential for government entanglement in religious matters prevents judicial review. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 721-23, 96 S. Ct. 2372, 2386-87 (1976).

This court has held that the Establishment Clause prevents civil courts of Minnesota from considering a breach of contract claim brought by a pastor against her former church. Black v. Snyder, 471 N.W.2d 715, 720 (Minn. App. 1991), review denied (Minn. Aug. 29, 1991). In Black, a Lutheran associate pastor filed a discrimination charge against her supervising pastor alleging sexual harassment. Id. at 717-18. Shortly thereafter, the congregation voted to discharge Black and Black sued the church for, among other claims, breach of contract. Id. at 718. This court held that hearing Black's breach of contract claim would cause excessive entanglement because it would require the court to examine issues of church doctrine and governance and would require court review of the church's motives. Id. at 720.

This court has also refused to hear a defamation case to avoid excessive entanglement under the Establishment Clause. Schoenhals v. Mains, 504 N.W.2d 233, 236 (Minn. App. 1993). The Schoenhals alleged that their pastor defamed them by communicating to the congregation that they had been poor parishioners. Id. at 234-35. The pastor alleged that his statements were based in the Bible and in the church's religious beliefs and practices. Id. at 235. This court found that while the pastor's statement appeared unrelated to church doctrine, court review of the defamatory statements would require an inquiry into the church's motives and disciplinary matters. Id. at 236. Accordingly, this court found that to prevent excessive entanglement, the district court must not hear the case. Id.

The Pastors argue that a review of this case will not require the court to entangle itself in issues of Lutheran doctrine. We disagree. Delegates to the Churchwide Assembly, the highest legislative authority of the Lutheran church, voted to divest funds from companies with holdings in South Africa and directed the Board of Pensions to implement the divest-

ment policy. While the Board of Pensions is required to prudently invest its holdings, the ELCA created the Board to both provide for pastors' retirement needs and assist the ELCA in accomplishing doctrinal goals. The ELCA enacted the equivalency policy in an effort to further its social and doctrinal goals of opposing apartheid. Accordingly, any review of the Board of Pensions' divestment and equivalency policies would entangle the court in reviewing church doctrine and policy.

In addition, the district court would be required to examine church doctrine and organization to determine whether a breach of contract occurred in this case. The plan document is the primary "contract" between the parties. It provides that the Board of Pensions shall discharge its duties with the care that a prudent person would use in the conduct of an enterprise of like character with like aims. Thus, the district court would be required to examine the ELCA's "aims" before it could determine the breach of contract issue. Such inquiry into church motives is forbidden by the Establishment Clause of the United States Constitution.

The Pastors also contend that this case can be resolved on neutral principles of contract and trust law. We disagree. The flaw in this contention is illustrated by the Pastors' admission that the ELCA could properly prohibit investments by the Board of Pensions in morally obnoxious commercial activity such as prostitution or pornography. There are no neutral principles of law that would enable a district court to distinguish between investments that Lutheran doctrine should find to be morally acceptable and those that it should find to be morally unacceptable. We conclude that the Establishment Clause of the First Amendment deprives the district court of subject matter jurisdiction in this dispute because review of this issue would require the district court to look beyond neutral principles of contract and trust law and entangle itself in issues of church doctrine.

II.

The ELCA and the Board of Pensions allege that the Freedom of Conscience Clause of the Minnesota Constitution deprives the district court of subject matter jurisdiction. Article I, section 16 of the Minnesota Constitution provides that

> [t]he right of every man to worship God according to the dictates of his own conscience shall never be infringed * * * nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state * * * .

The Freedom of Conscience Clause affords greater protection for religious liberties against government action than the federal constitution. State v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990). In determining whether government action violates the Freedom of Conscience Clause, Minnesota courts consider whether: (1) the objector's belief is sincerely held; (2) the action burdens the exercise of religious beliefs; (3) the state's interest is compelling; and (4) the state action uses the least restrictive means. Hill-Murray Fed'n. of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857, 865 (Minn. 1992). Under the Freedom of Conscience Clause, only governmental interests in "peace or safety" and against "acts of licentiousness" will excuse government imposition on religious freedom. Hershberger, 462 N.W.2d at 397.

This court has applied the Freedom of Conscience Clause recently to a discrimination claim brought by a lay church employee against the Eckankar church. Geraci v. Eckankar, 526 N.W.2d 391 (Minn. App. 1995), review denied (Minn.

Mar. 14, 1995), cert. denied, 116 S. Ct. 75 (1995). Carol Geraci was a computer programmer for the Eckankar church who claimed that the church discriminated against her on the basis of gender. Id. at 395. The church alleged that Geraci was terminated for failing to work harmoniously with her co-workers in disregard of the sacred teachings of Eckankar. Id. This court concluded that while the state's interest in eradicating discrimination is compelling, it could not question Eckankar's basis for decisions claimed to be doctrinally related because to do so may compel the church to conform its religious beliefs with the government's or with the majority culture's beliefs. Id. at 399.

An analysis of the four elements of the Freedom of Conscience Clause test leads us to conclude that allowing the district court's review of this matter would violate the Freedom of Conscience Clause. First, there is no question that the ELCA acted pursuant to a sincerely held religious belief by enacting the equivalency policy. The Lutheran World Federation declared that apartheid must be rejected as a matter of the Lutheran faith itself. Similarly, the Constituting Convention of the ELCA passed a resolution stating that divestment was the appropriate response to the "sin of apartheid."

Second, review of this case would burden the exercise of the ELCA's religious beliefs. If the civil courts were allowed to rescind pension plan contracts every time a group of dissenting participants disagreed with the Board of Pensions' social or moral investment strategies, the ELCA's ability to express its faith through social and moral investment would be substantially compromised. Additionally, as in Geraci, to review this case, the district court would be required to question the ELCA's basis for a decision that it contends was founded in Lutheran doctrine. Judicial inquiry into issues of church doctrine is itself a substantial burden. Id. Accordingly, a review of this case would burden the ELCA's exercise of religious beliefs.

Third, the government does not have a compelling interest in reviewing this case. The Pastors argue that there is an important governmental interest in providing a forum for review of this matter. We disagree. The forum best suited to review the Pastors' grievance is the Churchwide Assembly. The delegates to the Churchwide Assembly debated the appropriateness of the equivalency policy at length. As the highest legislative authority in the ELCA, the Churchwide Assembly's determination on this issue is final. The civil courts need not hear this case to ensure public "peace or safety" and the Pastors' breach of contract action does not allege an act of "licentiousness," as required by the Minnesota Freedom of Conscience Clause.

Because the Pastors have not alleged a compelling governmental interest in hearing this dispute, we need not address the fourth element of the Freedom of Conscience Clause test. We conclude that a review of this case would substantially burden the ELCA's exercise of religion. Therefore, the Freedom of Conscience Clause of the Minnesota Constitution deprives the district court of subject matter jurisdiction in this dispute.

DECISION

The district court erred in denying appellants' motion for summary judgment on the grounds that the court did not have subject matter jurisdiction. The district court's decision is reversed and this matter is dismissed pursuant to the Establishment Clause of the First Amendment and the Freedom of Conscience Clause of the Minnesota Constitution.

Reversed.

s/Thomas Kalitowski
11-17-95

Evangelical Lutheran Church in America

CONSTITUTIONS, BYLAWS, AND CONTINUING RESOLUTIONS

as adopted by the Constituting Convention
of the Evangelical Lutheran Church in America
(April 30, 1987)

and

as amended by the
First (1989), Second (1991), and Third (1993)
Churchwide Assemblies
of the Evangelical Lutheran Church in America

Edition current as of September 1993

INTRODUCTION

The basic commitments of the Evangelical Lutheran Church in America (ELCA) as well as its organizational outline, structural patterns, and rubrics of governance are reflected by this church's constitutions, bylaws, and continuing resolutions. These documents govern our life together as congregations, synods, and churchwide organization.

We find ourselves consulting these documents again and again to guide, direct, and assist us. They express for us, as a church body, our understanding of the nature of the church. They contain our statement of purpose and our principles of organization. They define our membership, our relationships, and our operating patterns.

While we recognize that the Evangelical Lutheran Church in America officially began operation as a church body on January 1, 1988, through the uniting of three predecessor bodies, we realize that our roots reach deep into the soil of the Lutheran Confessions and we draw constant nourishment from our biblical foundations. So we really are an old church with a different name and structure from those of our three predecessor church bodies. We are a particular gathering of people known as the Evangelical Lutheran Church in America. As part of the whole Church of Christ, we announce and declare the teachings of the prophets and apostles and seek to confess in our time the faith once delivered to the saints.

The Rev. Lowell G. Almen
Secretary

Day of commemoration
for Henry Melchoir Muhlenberg
October 7, 1993

CODIFICATION EXPLANATION

The provisions of the Constitution, the Bylaws, and the Continuing Resolutions that pertain to the same matter have been placed together. This arrangement requires that the three types of material be identified by means other than physical separation.

The three types of provisions are identified by the following devices:

a. All constitutional provisions are in bold face type.

b. All bylaw provisions are printed in light face type.

c. All continuing resolutions are printed in *italic* type.

d. A numerical codification indicates general subject, constitutional provisions, bylaw provisions, and continuing resolutions.

PREAMBLE

Convinced that the Holy Spirit is leading us toward unity in the household of God, we of The American Lutheran Church, The Association of Evangelical Lutheran Churches, and the Lutheran Church in America give thanks to God for the faith we share together in Christ and, by adopting this constitution, form a new church, in the name of the Father, the Son, and the Holy Spirit.

. . . .

Chapter 4.

STATEMENT OF PURPOSE

4.01. **The Church is a people created by God in Christ, empowered by the Holy Spirit, called and sent to bear witness to God's creative, redeeming, and sanctifying activity in the world.**

. . . .

4.03. **To fulfill these purposes, this church shall:**

a. Receive, establish, and support those congregations, ministries, organizations, institutions, and agencies necessary to carry out God's mission through this church.

b. Encourage and equip all members to worship, learn, serve, and witness; to fulfill their calling to serve God in the world; and to be stewards of the earth, their lives, and the Gospel.

. . . .

Chapter 8.

RELATIONSHIPS

8.10 **Relationship Between Congregations, Synods, and the Churchwide Organization**

8.11 **This church shall seek to function as people of God through congregations, synods, and the churchwide organization, all of which shall be interdependent. Each part, while fully the church, recognizes that it is not the**

whole church and therefore lives in a partnership relationship with the others.

. . . .

Chapter 12

CHURCHWIDE ASSEMBLY

12.10 Description and Authority of the Churchwide Assembly

12.11 The Churchwide Assembly shall be the highest legislative authority of the churchwide organization and shall deal with all matters which are necessary in pursuit of the purposes and functions of this church. The powers of the Churchwide Assembly are limited only by the provisions of the Articles of Incorporation, this constitution and bylaws, and the assembly's own resolutions.

. . . .

Chapter 14

CHURCH COUNCIL

14.10 Purpose and Meetings

14.11 This church shall have a Church Council which shall be the board of directors of this church and shall serve as the interim legislative authority between meetings of the Churchwide Assembly.

. . . .

Chapter 17.

OTHER UNITS OF THE CHURCHWIDE ORGANIZATION

17.10 Other Churchwide Units

17.11 This church may establish other churchwide units and organizations to carry out the purpose and functions of this church.

17.12. Other churchwide units include:

a. the church periodical;

b. the ELCA Foundation, operating under the Endowment Fund;

c. the Women of the ELCA;

d. the Publishing House of the ELCA; and

e. the Board of Pensions.

The Endowment Fund of the Evangelical Lutheran Church in America, the Board of Pensions of the ELCA, the Publishing House of the ELCA, and the Women of the ELCA may be separately incorporated units of this church.

. . . .

17.60. Board of Pensions

17.61 This church shall have a church pension and other benefits plans unit. This Board of Pensions shall be incorporated. Its executive director shall be president of the corporation and shall serve as its chief executive officer.

17.61.01. The Churchwide Assembly shall:

a. authorize the creation of the governance structure for this program;

b. approve the documents establishing and governing the program;

c. refer any amendments to the program initiated by the Churchwide Assembly to the Board of Pensions for recommendation before final action by the Church Council, assuring that no amendment shall abridge the rights of members with respect to their pension accumulations; and

d. direct the establishment of an appeal process within the Board of Pensions to enable participants in the plans to appeal decisions.

. . . .

17.61.07. The specific responsibilities of the Board of Pensions shall be enumerated in continuing resolutions. Such continuing resolutions may be amended by a majority vote of the Churchwide Assembly or by a two-thirds vote of the Church Council. Should the board disagree with the action of the Church Council, it may appeal the decision to the Churchwide Assembly.

17.61.A91. ***Responsibilities of the Board of Pensions***

a. This board shall manage and operate the pension and other benefits plans for this church with the design and policy adopted by the Churchwide Assembly and

shall invest the assets according to its best judgment.

b. The Investment Committee of the Board of Pensions shall receive advice and counsel from the Advisory Committee on the Church's Corporate Social Responsibility formed by the Division for Church in Society and within the context of fiduciary responsibility make appropriate recommendations to the board.

. . . .

d. This board shall provide pension, health, and other benefits exclusively for the benefit of eligible members working within the structure of this church and those benefits shall be on the same basis for all the participants.

. . . .

[Seal]

ARTICLES OF INCORPORATION

Board of Pensions
of the
Evangelical Lutheran Church in America

February 13, 1988

ARTICLE II

This corporation is organized and shall be operated exclusively for religious purposes and exclusively for the benefit of and to assist in carrying out the purposes of the Evangelical Lutheran Church in America (the "ELCA"), a Minnesota nonprofit corporation. In furtherance of these purposes this corporation shall manage and operate the worker benefits plans for the ELCA and its institutions within the design and policy adopted from time to time by the Churchwide Assembly or Church Council of the ELCA.

Trust Document

ELCA Regular Pension Trust

BOARD OF PENSIONS

[seal] Evangelical Lutheran Church in America

800 Marquette Ave., Suite 1050 • Minneapolis, MN 55402 • (612) 333-7651

January 1, 1995

Sec. 1.03 Purpose. The Regular Pension Trust is formed exclusively for religious and charitable purposes and in connection therewith exclusively for the benefit of, and to assist in carrying out the purposes of, the Evangelical Lutheran Church in America (the "ELCA"), an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986, by providing pension benefits to employees of the ELCA and other organizations described in Section 501(c)(3) of the Internal Revenue Code of 1986, that are affiliated with the ELCA (including its member congregations, colleges, schools, and social service organizations), and to ordained ministers on the ELCA roster.

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APARTHEID

Statements and actions of
The American Lutheran Church
dealing with the apartheid
system and justice for all
peoples in South Africa
and Namibia: 1980-1985

- "Goals for Combating Apartheid" (1985)
- "Goals for Combating Apartheid" (1981)
- "Apartheid in Southern Africa—Is It Any of Our Business?" (1981)
- "Human Rights of the People of Namibia" (1980)
- "Opposition to Apartheid" (1980)
- South Africa—Divestment (1981)

[Seal]

III. Apartheid in Southern Africa— Is It Any of Our Business? (1981)

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2. "STATUS CONFESSIONIS"

The American Lutheran Church has declared its opposition to the apartheid system in the strongest of terms. Its 1980 General Convention voted unanimously to "express its unequivocal rejection of apartheid and all other forms of racial discrimination in our own society as well as in other nations, and [to] declare apartheid to be a matter of 'status confessionis.'"

The term means "a state of confession." It was applied to the situation of Lutheran churches in southern Africa, White and Black, by the Sixth Assembly of the Lutheran World Federation, meeting in Tanzania in June 1977. That gathering of the worldwide Lutheran family was determined to say that the apartheid system is so oppressive and so contrary to the Lutheran understanding of the unity of believers in Christ and the equality of the entire human family that it must be rejected as a matter of the faith itself:

> "On the basis of faith and in order to manifest the unity of the church," said the Sixth Assembly, "churches [should] publicly and unequivocally reject the existing apartheid system."

Apartheid is not simply a typical political question, about which Christians may hold differing opinions. It must be viewed from much the same theological perspective that the Confessing Church in Germany adopted in opposing the Hitler regime 40 some years ago. Apartheid is to be rejected because it violates a central belief of the church as expressed in the

Augsburg Confession. The immediate context for the LWF Sixth Assembly action was the separation of Black and White Lutherans in South Africa. As long as that cultural pattern (reinforced by South African law) was followed by the churches, an unbiblical criterion for unity—racial identity—was being used. And since that criterion goes beyond Augsburg's requirement (unity exists when there is agreement on the proclamation of the Word and the administration of the Sacraments), the racial test of unity is not valid and must be rejected.

Apartheid, therefore, presents the church with a "state of confession" because it attacks, in its impact on both church and society, the very heart of the church's confession of faith. By its 1980 convention action, the ALC is affirming the same position. It means that, for the ALC corporately, there can be no argument over whether apartheid is acceptable or reformable. It means that apartheid is viewed by us as simply and starkly in conflict with the biblical faith we hold. It is not a political ideology with which believers may compromise, but must be opposed by whatever means are at hand.

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Minutes

EVANGELICAL LUTHERAN CHURCH IN AMERICA
CONSTITUTING CONVENTION
April 30—May 3, 1987
The Ohio Center
Columbus, Ohio

Published under the auspices of Lowell G. Almen, Secretary
Evangelical Lutheran Church in America

ELCA PUBLISHING HOUSE
Augsburg Publishing House/Fortress Press
Minneapolis, Minnesota

Voted: **That the following resolution be adopted by a standing vote:**

ELCA 87.2.50 Whereas, the ALC, LCA, and AELC have struggled to stand with you in hope for the coming of freedom, peace, and justice for all people in your lands; and

Whereas, the ALC, LCA, and AELC have long recognized, with the world, the United Nations, and the World Court's judgment that Namibia is illegally occupied by South Africa; and

Whereas, the ALC, LCA, and AELC have continually spoken and tried to act in opposition to the sin of apartheid; and

Whereas we give thanks to God for your witness in the face of your continued suffering, and also give God thanks for your faithfulness and courage; and

Whereas, we have been enriched and inspired by our lives and faith; therefore, be it

Resolved, that we, the delegates of the Constituting Convention of the ELCA, greet you, the members of the Evangelical Lutheran Church in South Africa (ELCSA) and United Evangelical Lutheran Churches of Southwest Africa/Namibia (UELCSWA/N); and be it further

Resolved, that we, the delegates of the Constituting Convention of the ELCA, assure you that our prayers and solidarity with you in the Gospel and in your struggle for freedom with justice

will continue unabated; and be it further

Resolved, that we, the delegates of the Constituting Convention of the ELCA, express our unqualified opposition to the apartheid system in South Africa, and the illegal occupation and oppression by South Africa of Namibia; and be it further

Resolved, that we pledge to you that we will work tirelessly to see that none of our ELCA Pension Funds will be invested in companies doing business in South Africa; and be it finally

Resolved, that the text of this resolution be sent to the President of the U.S.A., the President of South Africa, and our Lutheran church leaders in South Africa and Namibia.

ELCA Board of Pensions Policy Statement

As part of the Evangelical Lutheran Church in America, the Board of Pensions continues to be sympathetic to the plight of the oppressed people of South Africa/Namibia. It joins Christians throughout the world in condemning, without reservation, the policies of apartheid that prevail in those nations. The Board of Pensions has declared its desire fully to reflect the action of the Constituting Convention with respect to divestment for all investments to the extent permitted by the Board's fiduciary responsibilities.

The Board of Pensions of the ELCA, as have the Boards of Pensions of the predecessor bodies, has expended a great effort in considering how it can respond, within the fiduciary responsibilities placed upon the Board by Minnesota trust law and the ELCA Bylaws [16.51.C87 (b) *"The Committee on Investments of the Board of Pensions shall receive advice and counsel from the Advisory Committee on the Church's Corporate Social Responsibility formed by the Commission for Church in Society and within the context of fiduciary responsibility make appropriate recommendations to the board."*] to the will of the church as expressed, first in the Constituting Convention relative to divestment of U.S. companies with South Africa investments and, second, by the Church Council.

The Board is responsible not only to the ELCA as a whole, but also, as fellow Christians, to our oppressed brothers and sisters of South Africa/Namibia. Also, the Board is responsible to the members of the Pension Plan and to their beneficiaries. The Board must constantly bear in mind that the trust assets it manages do not belong to the ELCA, but to the members of the Plan. Fiduciary responsibility means that the Board is bound, not only by trust law, but also by the ELCA, to consider in the first instance, the interests of the members

and beneficiaries, and exercise its responsibilities in a prudent manner for the sole purpose of the financial well-being of the members and beneficiaries.

Taking the above into consideration, the Board of Pensions has chosen the following steps:

First, the Board of Pensions has directed that, whenever the conditions of risk and return are equal in the choice among stocks and bonds held by the Board on behalf of Plan members, or available for purchase, the holdings in companies with South Africa investments will be divested, and similarly, investments in these companies will not be made.

Second, in order to give the members of the pension plans maximum opportunity to direct their own accumulations to the existing Social Purpose Funds, which have no holdings in companies with direct investments in South Africa, the Board seeks agreement from the Church Council to amend the Pension Plan so as to allow all non-retired members freely to respond to the South African divestment issue by transferring their accumulations among funds, and specifically to and from the Social Purpose Funds.

Third, the Board seeks approval from the Church Council to establish a third Social Purpose Fund, a "balanced fund" that includes both stocks and bonds.

Fourth, although the Board of Pensions is prohibited from offering investment advice to members, it will fully inform all plan members regarding the nature and characteristics of the Social Purpose Funds so that members will know the issues involved in transferring their assets to, or from, Social Purpose Funds. The Advisory Committee is asked to recommend screens for the Social Purpose Funds to the Board for evaluation and approval.

Fifth, the Board of Pensions will continue to receive advice on proxy matters from the Corporate Social Responsibility Advisory Committee, and will respond cooperatively in shareholder actions to the extent that such actions are in the best interests of the Plan members.

Sixth, the Board of Pensions is the manager of various funds that belong to other units of the Church and as such is amenable to direction from them as to the investment of these funds.

Seventh, the Board will continue to seek constructive ways to deal with the issue of divestment in companies doing business in South Africa.

Finally, if the Church Council deems the foregoing seven steps to be an insufficient response, the Board of Pensions is willing to engage legal counsel to prepare a petition to come before the court of appropriate jurisdiction seeking an interpretation of the laws governing fiduciary duties that would allow the Board to conform to the Church Council advice respecting all funds managed by the Board. This approach to the court would be made because the Board has requested and received opinions from three different law firms cautioning that divestment may constitute a breach of fiduciary responsibility. The Board of Pensions will take this action if, and only if, the Church Council advises that it be undertaken and agrees to allocate funds sufficient to reimburse the Board of Pensions for all expenses related to it.

EVANGELICAL LUTHERAN CHURCH IN AMERICA
CHURCH COUNCIL
July 10-11, 1988

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VOTED:
CC88.7.83 To affirm:

that the resources managed by the ELCA are to be invested or expended in ways that enhance the mission of this church;

that the Board of Pensions, as a church-wide unit of the ELCA, bears responsibility both to its members and beneficiaries and to the ELCA as a whole; and, in the light of the action of the ELCA Constituting Convention, that the Board of Pensions bears a clear responsibility to respond to the oppression of our brothers and sisters in South Africa and Namibia; and

that the Board of Pensions will fully reflect the action of the Constituting Convention that "none of our ELCA Pension Funds . . . be invested in companies doing business with South Africa," within the context of its fiduciary responsibility.

To encourage the Board of Pensions to do all in its power to accomplish this goal as quickly as legally possible and to come to the Novem-

ber meeting of the Church Council with a plan that will result in the significant reduction of funds invested in South Africa in the near future.

To request that the Board of Pensions provide semiannual reports to the Church Council that include separate listings of companies in which it has invested that directly or indirectly do business with South Africa;

To request that the Board of Pensions prepare for the November 1988 meeting of the Church Council:

amendments to the pension plan which would allow all non-retired members to transfer their accumulations among funds, and specifically to and from the Social Purpose Funds; and

a description of a third Social Purpose Fund, which would be a "balanced fund" including both stocks and bonds.

To request that the Board of Pensions and the Commission for Church in Society explore ways to inform fully all plan members regarding the nature and characteristics of the Social Purpose Funds.

To request that the Board of Pensions and the Commission for Church in Society to explore jointly the feasibility of petitioning the court of appropriate jurisdiction to seek an interpretation of the laws governing fiduciary responsi-

bility as such laws relate to the divestment issue within the broad scope of the mission of the church; and that the Commission for Church in Society and the Board of Pensions report their findings to the Church Council.